No. 95-813

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BRAD BENNETT, ET AL., *Petitioner*,

v.

MARVIN PLENERT, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, ALASKA, ARIZONA, ARKANSAS, COLORADO, HAWAII, IDAHO, KANSAS, MISSOURI, MONTANA, NEBRASKA, OHIO, UTAH AND WEST VIRGINIA ON THE MERITS IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

Under the "citizen suit" provision of the Endangered Species Act of 1973 ("ESA"), section 11(g)(1), 16 U.S.C. § 1540(g)(1), "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the ESA or regulations issued thereunder. The questions presented are:

1. Whether the broad standing mandated by Congress in the citizen suit provision of the ESA is subject to a "zone of interests" test as a further, judicially imposed, prudential limitation on standing.

2. If standing to sue under the ESA is subject to prudential limitations, whether standing is limited exclusively to litigants asserting an interest in preserving endangered species, as the Ninth Circuit held, and does not include litigants whose economic interests have been adversely affected by the Government's violations of the ESA.

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## INTEREST OF AMICUS CURIAE

Amici States are vitally interested in the scope of standing under the citizen suit provision of the Endangered Species Act ("ESA"), section 11(g)(1), 16 U.S.C. § 1540(g)(1). Because States are "persons" within the meaning of the ESA, see section 3(13), 16 U.S.C. § 1532(13), they are entitled to sue under the citizen suit provision. Consequently, the States' ability to pursue judicial remedies for violations of the ESA is directly affected by the interpretation of the scope of ESA standing.

Amici States also have a strong interest in the implementation of the ESA provisions that were allegedly violated in this case, sections 4 and 7 of the ESA, 16 U.S.C. §§ 1533, 1536. A great deal of land, resources, and productive economic activity within amici States is subject to regulation under sections 4 and 7 of the ESA. If litigants whose economic interests are harmed by the Federal Government's violation of sections 4 and 7 lack standing to challenge those ESA violations, then the economic well-being of States and their citizens will be diminished unlawfully without judicial recourse.

The State of California also has a particular interest in this case. The Klamath Project, which is the reclamation project at issue in this case, is located partly in California. The State of California ceded land to the United States, and authorized the lowering of the levels of certain lakes, including Clear Lake, for the Klamath Project. See Cal. Stats. 1905, ch. 6, p.4. Clear Lake Reservoir, one of the two reservoirs involved in this litigation, is located entirely in California. See Pet. App. 32, ¶1; 34, ¶5 C, D. Consequently, California has a close connection with, and strong interest in, this controversy over the operation of the Klamath Project, and the allocation of water from Clear Lake Reservoir.

## STATEMENT OF THE CASE

### A. Nature of the Controversy

The Klamath Project was an early reclamation project undertaken by the U.S. Bureau of Reclamation ("Bureau") pursuant to the Reclamation Act of 1902 (codified at various provisions of 43

U.S.C. section 371 et seq.). Pet. App. 35. Authorized by Congress in 1905, see Act of Feb. 9, 1905, ch. 567, 33 Stat. 714, the Klamath Project consists of several dams and reservoirs along the California-Oregon border. *Id.* at 35-36. The purpose of the project was to reclaim certain lands, and store and deliver irrigation water to the reclaimed lands for agricultural and other productive uses. Gerber Reservoir, located in Oregon, and Clear Lake Reservoir, located in California, are parts of the Project. *Id.* at 34.

Petitioners, Horsefly Irrigation District and Langell Valley Irrigation District, have water supply contracts with the Bureau to receive water from the Gerber and Clear Lake Reservoirs. *Id.* at 34. Petitioners Bennett and Giordano are ranchers and members of these irrigation districts who receive water from Clear Lake Reservoir under the irrigation district contracts with the Bureau. For most of this century, the Bureau has stored and released water from these reservoirs according to standard operational procedures which maintained a reliable supply of irrigation water to farmers and ranchers in the area. *Id.* at 36.

In 1988, the U.S. Fish and Wildlife Service ("FWS") listed the Lost River sucker and the shortnose sucker as endangered species of fish under the ESA. 53 Fed. Reg. 27130-27134 (1988). The shortnosed sucker is found in Gerber and Clear Lake Reservoirs, and the Lost River sucker is found in Clear Lake Reservoir, among other places. Pet. App. 36; see also 59 Fed. Reg. 61744-61758 (1994) (proposed designation of critical habitat for the Lost River and shortnosed suckers).

Following the listing of the fish as endangered, the Bureau entered into formal consultation with the FWS pursuant to section 7 of the ESA, 16 U.S.C. § 1536. The purpose of this consultation was to assess the effects of the long-term operation of the Klamath Project upon the endangered fish. As a result of this consultation, the FWS issued a 1992 Biological Opinion which concluded that Klamath Project operations, including releases of water from the Clear Lake and Gerber Reservoirs for irrigation pursuant to long-standing operational procedures, would likely jeopardize the continued existence of the fish. The FWS also specified in its Biological Opinion "reasonable and prudent alternatives" that the FWS believed would avoid jeopardy to the fish. These reasonable and prudent alternatives included restrictions on releases of



irrigation water and the maintenance of certain lake levels in the Gerber and Clear Lake Reservoirs. The Biological Opinion also contained an "incidental take" statement describing the "take" or loss of endangered fish that was expected to occur if the Bureau operated the project in accordance with the FWS' reasonable and prudent alternatives. So long as the Bureau operated the Klamath Project in accordance with the reasonable and prudent alternatives specified in the biological opinion -- including the requirement to maintain certain lake levels in Gerber and Clear Lake Reservoir -- this "incidental take" statement would immunize the Bureau from civil and criminal liability for the "take" of endangered suckers resulting from operation of the Klamath Project. See 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

### B. Proceedings Below

Petitioners filed suit against respondents, the Secretary of the Interior and FWS officials, alleging that respondents violated the ESA and the Administrative Procedure Act ("APA") in the section 7 consultation over the Klamath Project. Pet. App. 33, 40-42. Petitioners alleged that the maintenance of certain lake levels in the Gerber and Clear Lake Reservoirs pursuant to the Biological Opinion deprived them of irrigation water that otherwise would be available for release from the reservoirs. *Id.* at 34, 40. The complaint alleged two main theories why the Biological Opinion was invalid and should be set aside. The first was that respondents failed to use the "best scientific data available," as required under section 7(a)(2) of the ESA, in formulating the Biological Opinion, and in concluding that irrigation releases from the reservoirs were jeopardizing the endangered fish and that maintaining certain lake levels would help the fish. *Id.* 37-41. The second theory was that the Biological Opinion implicitly determined "critical habitat" for the endangered fish without considering the economic impacts of such designation, as is required under section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2). According to the complaint, the specification in the Biological Opinion of certain lake levels that had to be maintained in Gerber and Clear Lake Reservoirs was essentially a determination of the "critical habitat" for the fish. Section 4 of the ESA specifies that the FWS must consider

economic impacts when designating critical habitat for a species. However, by using the Biological Opinion as a vehicle for designating critical habitat, the FWS had wrongly circumvented the section 4 requirement to consider economic impacts.[1/]

The Ninth Circuit affirmed the district court's dismissal of the action for lack of standing. The Ninth Circuit reasoned that the prudential "zone of interests" test applied, and that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA." Pet. App. 11 (emphasis in original). The Ninth Circuit expressed the view that, because petitioners wanted to use project water for irrigation and recreational purposes rather than species preservation, they were asserting a "competing interest" in the water that was "inconsistent with the [ESA's species preservation] purposes." *Id.* at 17. This Court granted certiorari on March 25, 1996.

## SUMMARY OF ARGUMENT

### I

Under section 10 of the APA, any person "aggrieved by agency action within the meaning of a relevant statute" is authorized to maintain an action challenging such agency action. 5 U.S.C. § 702. This Court, however, has adopted prudential standing requirements limiting the right of persons to challenge agency action under the APA. Under these prudential requirements, actions can

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1. The FWS' subsequent actions lend credence to petitioners' theory of "implicit designation" of critical habitat. When the FWS listed the suckers as endangered in 1988, it postponed designation of critical habitat for the fish. Environmental organizations then sued the FWS in 1991 for failure to designate critical habitat for the fish. See 59 Fed. Reg. 61745 (1994) (describing the litigation). The FWS subsequently proposed critical habitat for the fish in 1994 which included specified lake levels for the Gerber and Clear Lake Reservoirs, known as "full pool elevation". See 59 Fed. Reg. 61744, 61750, 61754-61755, 61756-61758 (1994). Therefore, the FWS has acknowledged that maintaining specified lake levels of the Gerber and Clear Lake Reservoirs--which is what the 1992 Biological Opinion purported to do--constitutes the designation of critical habitat for the endangered suckers.



be maintained only by persons whose interests fall within the "zone of interests" that are "protected or regulated" by the relevant statute. *Clarke v. Securities Industries Association*, 479 U.S. 388 (1987); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). The "zone of interests" test is a guide for determining whether Congress intended to authorize particular plaintiffs to maintain actions challenging particular agency actions.

The "zone of interests" test, by providing that both "protected" and "regulated" parties have standing to challenge agency action, ensures that litigants have access to the courts regardless of whether they benefit from, or are burdened by, the statutory scheme. Litigants whose interests are "protected" by a statute have an incentive to guard against lax agency enforcement, and to ensure that the agency protects their interests as vigorously as Congress intended. In contrast, litigants whose interests are "regulated" by the statute have an incentive to guard against overzealous administrative enforcement which goes beyond the bounds set by Congress. In other words, those who are "protected" have an incentive to guard against underregulation, and those who are "regulated" have an incentive to guard against overregulation. The "zone of interests" test thus affords standing both to those who benefit from the regulatory scheme and those who are burdened by it. The Ninth Circuit, by holding that prudential standing extends only to those who pursue environmental goals, allows parties who are perceptibly benefitted by the statute to challenge agency action, but not parties who are burdened by it. Thus, the Ninth Circuit decision effectively allows challenges by those who charge that the agency has underregulated, but not by those who charge that the agency has overregulated.

In several cases involving the standing of competitors, this Court has held that parties have standing to challenge agency action if they are directly affected by the agency action, whether or not the agency action promotes their interests or otherwise directly applies to them. *Data Processing*, 397 U.S. 150; *Arnold Tours, Inc. v. Camp*, 401 U.S. 45 (1970); *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Clarke*, 479 U.S. 388. It is sufficient, this Court has stated, that the plaintiffs, although not directly regulated by the statute, are in competition with those who are directly

regulated. Such plaintiffs have standing because they are "directly affected" by the agency action. *Clarke*, 479 U.S. at 399 n. 14; *Data Processing*, 397 U.S. at 157.

The petitioners in this case meet prudential standing requirements under the ESA and are authorized to maintain an action under the APA, just as the plaintiffs were held to have standing in the competitor cases. The Secretary of the Interior has issued a Biological Opinion recommending that the Bureau of Reclamation reduce water deliveries to its contractors, including the petitioners, in order to protect certain endangered species in the reservoir. Under the ESA, the Bureau of Reclamation is subject to civil and criminal liability if it improperly jeopardizes an endangered species; the Bureau is immune from such liability, however, if it complies with the recommendations in the Secretary's Biological Opinion. Therefore, as a practical matter, the Bureau has no choice other than to comply with the Secretary's recommendation. Accordingly, the Secretary's Biological Opinion adversely affects the water rights held by the petitioners. The petitioners' interests are directly affected by agency action in the same way that the plaintiffs' interests were directly affected in the competitor cases. Moreover, this Court has recognized that water users, such as petitioners, who have contractual rights to water developed under the federal reclamation laws are the beneficial owners of the water. *Nevada v. United States*, 463 U.S. 110, 122-126 (1983); *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 614-616 (1945); *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937). Hence, the petitioners fall within the regulatory ambit of the ESA, and are authorized to maintain their action under the APA.

The petitioners are not only "regulated" by the ESA, but also, in a sense, are "protected" by it. Section 4(b)(2) of the ESA requires the Secretary to consider "economic impact[s]" in designating critical habitats. 16 U.S.C. § 1533(b)(2). Section 7 of the ESA requires the Secretary to use the "best scientific data" in determining whether to list endangered species. 16 U.S.C. § 1536. Thus, the ESA requires the Secretary of the Interior to follow certain procedures and apply certain methodologies in listing endangered species and designating critical habitats. These provisions impose constraints on agency action under the ESA for the benefit of those, such as petitioners, who may be burdened by



the species protection goals of the ESA. When these constraints are not followed, the economic interests of the petitioners--who are in "competition" with fish for scarce water--are impaired. In short, the statutory goals of the ESA in protecting endangered species are carried forth through methodologies and procedures that inure to the benefit of the petitioners. The petitioners are within the zone of interests protected and regulated by the ESA for this additional reason.

## II

The citizen suit provision of the ESA broadly provides that "any person" has standing to challenge an agency action that is in "violation" of the act. On its face, this language suggests that Congress intended to wholly abrogate prudential standing requirements as applied to parties who maintain actions under the ESA, subject only to the limitation that such parties must meet Article III standing requirements. To be sure, the legislative history of the citizen suit provision of the Clean Water Act indicates that Congress' primary objective was to ensure that parties would have standing to pursue environmental goals, whether or not they have economic interests at stake. Thus, it can be argued that Congress meant to abrogate prudential standing requirements only for those who pursue environmental goals.

The better view, the amici states believe, is that Congress meant to abrogate prudential standing requirements for all parties who allege a violation of the ESA, whether or not they pursue environmental goals. This view is clearly and unambiguously supported by the statutory language, which is a more reliable indicator of the congressional intent than the legislative history. Moreover, although the legislative history indicates that Congress intended to broaden standing for those seeking to promote environmental goals, the legislative history does not indicate that Congress did not intend to similarly broaden standing for parties who assert economic interests that are in competition with environmental goals. Thus, the citizen suit provision, properly construed, abrogates prudential standing requirements for all who maintain actions under the ESA, including those, such as the petitioners, who assert economic interests.

Whether or not the citizen suit provision abrogates prudential standing requirements for those who assert economic rather than environmental interests, the provision does not reduce or alter the standing that such parties might have under other statutory provisions to challenge agency action under the ESA. The citizen suit provision is not the exclusive remedy for ESA violations, and was not intended to preclude review of administrative action under the APA. Indeed, the citizen suit provision expressly provides that "[t]he injunctive relief provided by this subsection shall not restrict any right which any person . . . may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency)." 16 U.S.C. § 1540(g)(5) (emphasis added). Section 12 of the APA, 5 U.S.C. § 559, also provides that subsequent legislation shall not supersede or modify the right of review granted by section 10 of the APA unless the language in a subsequent statute "expressly" so provides. Here, petitioners have asserted their claims under both the citizen suit provision of the ESA and section 10 of the APA. As explained above, the petitioners have standing to challenge agency action under section 10 of the APA. Therefore, they are authorized to maintain their action regardless of how the citizen suit provision is construed.

Finally, whether or not the citizen suit provision of the ESA abrogates prudential standing requirements for those asserting economic interests, the provision clearly affords a cause of action for such persons if they are able to satisfy prudential standing requirements. The contrary view would wholly disregard the clear statutory language affording a cause of action to "any person" who asserts a "violation" of the ESA. As indicated above, the petitioners meet prudential standing requirements under the ESA, and thus are authorized to maintain an action under the citizen suit provision in any event.



## ARGUMENT

### I. PETITIONERS HAVE STANDING UNDER SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT.

### A. Constitutional Standing

Under section 10 of the APA, any person "aggrieved by agency action within the meaning of a relevant statute" may maintain an action challenging such agency action. 5 U.S.C. § 702. Notwithstanding this provision, Article III of the Constitution authorizes such persons to challenge agency action only (1) they suffer "injury in fact"; (2) there is a "causal connection" between the injury and the agency action; and (3) it is "likely" that the injury will be "redressed" by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Sierra Club v. Morton*, 405 U.S. 727, 740-741 (1972). To be cognizable under Article III, "injury in fact" must be to a "legally protected interest" that is both (1) "concrete and particularized" and (2) "actual or imminent, not 'conjectural or hypothetical.'" *Lujan, supra*, at 560. The "causal connection" must be such that the injury is "traceable" to the agency action, and is not the result of "independent action of some third party not before the court." Id.[2/]

The Solicitor General argued in his opposition to the petition for writ of certiorari that the petitioners lack constitutional standing because--although they may have suffered injury in fact--there is no causal connection between their injury and the agency action of which they complain, and their injury cannot be redressed by a

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2. One who asserts "procedural rights," such as failure to hold a hearing prior to denial of a license or failure to prepare an environmental impact report for a project located next door, may not be required to meet "all the normal standards for redressability and immediacy." *Lujan, supra*, 504 U.S. at 572 n. 7.

favorable decision. According to this argument, the Biological Opinion merely provided certain recommendations, and the Bureau voluntarily complied with the recommendations by reducing water deliveries to the petitioners; therefore, the agency action that caused the petitioners' injury was that of the Bureau rather than the Secretary.

The Solicitor General's argument is misplaced for two reasons. First, the Ninth Circuit and the district court specifically declined to consider the argument. Pet. App. 4, 27. Therefore, the argument should not be considered by the Court in this proceeding, but should only be considered on remand if this Court reverses the judgment below.

Second, the Solicitor General's argument is erroneous on the merits. Under the ESA, the Secretary is required to issue a biological opinion after determining that a proposed federal agency action may affect an endangered species or its critical habitat, and is required to suggest "reasonable and prudent alternatives" in cases where "jeopardy [of the species] or adverse modification [of critical habitat]" is found. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14. The federal agency--in this case, the Bureau--is required, after consultation with the Secretary, to ensure that its action "is not likely to jeopardize the continued existence of any endangered species or threatened species" or result in the destruction of the "critical habitat" of any such species. Section 7(a)(2), 16 U.S.C. § 1536(a)(2). Obviously the way that the federal agency fulfills its obligation of avoiding jeopardy to endangered species is by complying with the recommendations in the Secretary's Biological Opinion. Indeed, the federal agency is subject to liability under the ESA if it fails to avoid jeopardizing an endangered species or impairing critical habitat. 16 U.S.C. §§ 1532(13) (federal agencies are "persons"), 1540(a) (civil penalties), 1540(b) (criminal penalties), 1540(g) (injunctive relief). Typically, as in this case, the Biological Opinion contains an "incidental take" statement describing the "take" or loss that is expected to occur if the federal agency follows the reasonable and prudent alternatives in the opinion; the federal agency is immunized from civil and criminal liability if it follows these alternatives. See 16 U.S.C. § 1536(c)(2); 50 C.F.R. § 402.14(i)(5). In short, the federal agency has a defense to liability if it complies with the secretarial



determinations, and lacks such a defense if it does not. Therefore, although the ESA does not specifically require the Bureau to comply with the secretarial determination here, the Bureau has little choice, as a practical and legal matter, other than to comply.

This Court has held that constitutional standing requirements are satisfied if the plaintiff's injury is "fairly traceable" to the action of a particular agency, and if it is "likely" that the injury will be redressed if the agency action is reversed. *Lujan, supra*, 504 U.S. at 560 (emphasis added). Certainly the Bureau would not have restricted water deliveries to petitioners if the Secretary had not issued his Biological Opinion. By the same token, the Bureau obviously would not continue such restrictions if the Secretary's opinion were reversed. Therefore, the petitioners' injury here is "fairly traceable" to the Biological Opinion, and will "likely" be redressed if the Biological Opinion is reversed. Accordingly, the petitioners satisfy Article III standing requirements.

## B. Prudential Standing

Even if a party has satisfied constitutional standing requirements in challenging agency action under section 10 of the APA, certain "prudential" limits may still apply. *Valley Forge Christian College, supra*, 454 U.S. at 474-475; see *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). One such prudential limit is the requirement that "the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College, supra*, 454 U.S. at 475, quoting *Data Processing, supra*, 397 U.S. at 153; see also *Clarke, supra*, 479 U.S. at 396-400.[3] The "zone of

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3. The "zone" test for standing is distinguishable from, and less stringent than, the test for implying a private right of action. See *Clarke, supra*, 479 U.S. at 400 fn. 16. Under *Cort v. Ash*, 422 U.S. 66, 78 (1975), a private right of action may be implied only if the litigant is a member of a class for whose "especial benefit" the statute was enacted. However, under

interests" test is a guide for determining whether Congress intended to authorize particular plaintiffs to bring actions challenging particular agency actions; Congress presumptively does not intend to authorize actions by plaintiffs whose interests are "marginally related to or inconsistent with the purpose implicit" in the statute. *Clarke, supra,* 479 U.S. at 399; see *Data Processing, supra,* 397 U.S. at 164. Because the zone of interests test is a guide in determining congressional intent, the question whether the test applies to a particular statute, and the kind of interests that are included within the zone, must be determined by reference to congressional intent.

The rationale for the zone of interests test is that Congress presumptively intends that a plaintiff should have sufficiently particularized and adverse interests to ensure that he will be a "reliable attorney general to litigate the issues of the public interest," *Data Processing, supra,* 397 U.S. at 154; *Clarke, supra,* 479 U.S. at 397 n. 12, and to minimize the "potential for disruption inherent in allowing every party adversely affected by agency action to seek judicial review," *Clarke, supra,* 479 U.S. at 397. Litigants should be allowed to raise questions of "broad social import" only if they are "best suited to assert a particular claim," and only if their "individual rights would be vindicated." *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979). Generally, the zone of interests is more rather than less inclusive; "[w]here statutes are concerned, the trend is towards enlargement of the class of people who may protest administrative action." *Data Processing, supra,* 397 U.S. at 154.

In several cases involving the standing of competitors, this Court has held that parties have standing to challenge agency action if they are directly affected by the agency action, whether or not the agency action promotes their interests or otherwise directly applies to them. See *Data Processing, supra,* 397 U.S. 150, *Arnold Tours, Inc., supra,* 400 U.S. 45, *Investment Company Institute, supra,* 401 U.S. 617, and *Clarke, supra,* 479 U.S. 388. In these cases, the

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the "zone" test for standing, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke, supra,* 479 U.S. at 399-400.



Comptroller of the Currency had adopted administrative decisions allowing banks to enter certain non-banking fields of business. *Data Processing, supra* (data processing services); *Arnold Tours, supra* (travel services); *Investment Company Institute, supra* (collective investment funds); *Clarke, supra* (discount brokerage services). Non-banking entities that were already competing in these fields challenged the Comptroller's decisions, contending that their economic interests would be injured if the Comptroller's decisions were upheld. According to the competitors, the banking laws restricted the business activities that banks could conduct, and the Comptroller had violated these laws by allowing banks to enter these fields.

This Court found that all of these competitor plaintiffs had prudential standing under the "zone of interests" test. Significantly, the banking laws were <u>not</u> intended to protect or promote the economic interests of these bank competitors; Congress had restricted bank activities not to benefit bank competitors, but to protect the general public by assuring a sound banking system.[4/] Moreover, the competitors were not the objects of the challenged agency action; rather, the agency action applied directly to the banks. Nonetheless, the competitors were held to have standing because, as the Court stated, they were "directly affected" by the agency action. *Data Processing, supra,* 397 U.S. at 157; *Clarke, supra,* 479 U.S. at 399 n. 14. Because of this effect, they were "reliable attorneys general" for the purpose of litigating the issues of the public interest. *Clarke,* 479 U.S. at 397 n. 12, quoting *Data Processing,* 397 U.S. at 154. Therefore, the "regulated"

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4. See *Arnold Tours, Inc. v. Camp, supra,* 400 U.S. at 46 ("In *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors alone from competition."); *Clarke, supra,* 479 U.S. at 396 n. 10 (noting that in *Arnold Tours, Inc.,* "[t[he Court found it of <u>no moment</u> that Congress never specifically focused on the interests of travel agents in enacting section 4 of the Bank Service Corporation Act") (emphasis added). As the Court noted in *Clarke,* Justice Harlan in dissent in *Investment Company Institute* had argued that "there was no evidence that Congress had intended to benefit the plaintiff's class when it limited the activities permitted national banks" and "[t]he Court <u>did not take issue</u> with this observation". 479 U.S. at 398 (emphasis added).

component of the "zone" test accords standing to those who are directly and adversely affected by the regulation, and thus are burdened by it.

This pattern of competitive standing applies to the petitioners here. Just as the bank competitors had standing because they were injured economically by the Comptroller's decisions allowing banks to compete with them, the petitioners have standing because they were economically harmed by the Secretary's decision reallocating water to the fish with whom they "compete" for scarce water. Just as the bank competitors' economic interests were within the zone of interests of the banking laws even though the purpose of those laws was not to economically benefit bank competitors, the petitioners' interests are within the "zone of interests" even though the purpose of the ESA is not to benefit water users in competition with endangered fish. In short, the petitioners have standing because, like the plaintiffs in the competitor cases, their economic injury flows directly and immediately from the agency action. Like the competitors, the petitioners are "reliable attorneys general" for the purpose of litigating the issues of public interest.

The competitor cases build upon earlier cases recognizing economic injury as a standing basis. In *Federal Communications Comm. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), Sanders Brothers' radio station, which would have been harmed economically from competition by a new licensee, was held to have standing to challenge the Federal Communications Commission's ("FCC") issuance of a radio license to a rival station. The FCC argued that the FCC could not permissibly consider economic injury to competitors in its licensing decisions, and therefore that Sanders lacked standing under section 10 of the APA to challenge the FCC decision. *Id.* at 472. Although this Court agreed that the FCC could not permissibly consider the economic injury issue in its decision, the Court nonetheless held that the competitor's economic injury afforded standing to challenge the agency action. As the Court stated, "It does not follow that, because [Sanders] cannot resist the grant of a license to another on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from the order of the [FCC] granting the application." 309 U.S. at 476. Thus, once Sanders had standing because of his economic injury, he was entitled to challenge the



FCC decision on broader "public convenience and necessity" grounds. As in the competitor cases, the economic interest that gave Sanders standing need not be recognized as a "purpose" or "objective" or substantive policy in the relevant regulatory statute.

This Court has also held that a party not directly regulated by administrative action still has standing to challenge that action if the action affects the party's contractual relations with a regulated party. In *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), this Court upheld CBS' standing to challenge an FCC regulation restricting network broadcasting, stating that CBS' standing is "unaffected by the fact that the regulations are not directed to [CBS] and do not in terms compel action by it or impose penalties upon it because of its action or failure to act;" rather, it is sufficient that the regulations "purport to operate to alter and affect adversely [CBS'] contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." *Id.* at 422 (emphasis added). See also *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198-200 (1956).

In *Cotovsky-Kaplan Physical Therapy Assn, Ltd. v. United States*, 507 F.2d 1363 (7th Cir. 1975), the Seventh Circuit, per then-Judge Stevens, used the same logic in holding that an party whose contractual interests were affected by agency action was within the "zone of interests" of the statute, and thus had standing to challenge the agency action. The court stated that if a government agency "regulates the contractual relationships between a regulated party and an unregulated party, the latter as well as the former may have interests that are arguably within the regulated zone for purposes of testing standing." *Id.* at 1367 (emphasis added).

Here, petitioners' water supply contracts with the Bureau were directly and adversely affected by the Secretary's action under the ESA. The Bureau, in order to comply with the reasonable and prudent alternatives in the biological opinion, was compelled to reduce petitioners' entitlement to water under their contracts with the Bureau; there was no other way that the Bureau could comply with the Biological Opinion's reasonable and prudent alternatives and avoid potential criminal liability for an illegal "take." Consequently, even if the Bureau is deemed to be the direct object

of the Secretary's ESA action, petitioners still have standing based on the impairment of their contractual relations with the Bureau. Therefore, the petitioners are, for all practical purposes, the regulatory objects of the challenged ESA action.

The petitioners are also, to a degree, "protected" by the ESA, and thus fall within the "zone of interests" for this additional reason. Section 4(b)(2) of the ESA requires the Secretary to consider "economic impact[s]" in designating critical habitats. 16 U.S.C. § 1533(b)(2). Section 7 of the ESA requires the Secretary to use the "best scientific data" in determining whether to list endangered species. 16 U.S.C. § 1536. Thus, the statutory goals of the ESA are not only to protect endangered species, but also to impose certain constraints on agency action for the benefit of those adversely affected by such regulation. Specifically, the Secretary, in designating critical habitats, is mandated to consider the "economic impact[s]" on those, such as petitioners, whose economic interests would be affected. The Secretary, in determining whether to list an endangered species, must use the "best" scientific data, to ensure that the adverse consequences of listing will not occur on the basis of inadequate data. These constraints protect and inure to the benefit of those, such as petitioners, whose economic interests are affected by agency actions listing endangered species and designating critical habitats. Thus, the petitioners' interests are among those that are within the sweeping regulatory concern of the ESA. Indeed, this Court has held that parties, like the petitioners, who hold contracts for delivery of water from federal reclamation projects are the "beneficial owners" of the water. *Nevada v. United States*, 463 U.S. 110, 122-126 (1983); *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 614-616 (1945); *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937). Therefore, the petitioners have a recognized concern under federal law regarding agency decisions affecting delivery of water. For these reasons, the petitioners are not only "regulated" by the act, but also are "protected" by it.

The Ninth Circuit's view that prudential standing is limited to those seeking to further environmental goals would lead to completely one-sided enforcement of environmental statutes, such as the ESA. Under this view, litigants could challenge agency action on grounds that the Government underregulated and failed to adequately protect endangered species, but not on grounds that the



agency overregulated and failed to base its decision on valid scientific data, or failed to adequately consider economic impacts. Thus, the litigant could permissibly challenge the adequacy of the scientific data that supports the Biological Opinion, if the litigant argues that scientific data supports greater protection of the species; the litigant could not, however, make the same argument if the litigant argues that scientific data supports less protection. The inequity and absurdity of this result is reflected in the Ninth Circuit's view that the petitioners lack standing because they argue that the biological opinion is "not necessary to preserve the fish" and that "the suckers are doing just fine." App. 16. Under this view, the petitioners cannot even argue that the Secretary's Biological Opinion is scientifically unnecessary to preserve the species, regardless of the effect on their rights. Under the Ninth Circuit view, the prudential standing doctrine is less a "standing" doctrine than one that precludes certain causes of action based on their merits and objectives. This view lacks the requisite application of neutral principles to be a viable basis for determining who can gain access to the courts.

Indeed, the Ninth Circuit decision would virtually preclude challenges to Biological Opinions issued under the ESA, to the extent that such challenges assert that an endangered species has been overregulated. Certainly environmental plaintiffs are unlikely to sue the Secretary for overprotecting a species. It is unlikely that the affected federal agency would sue a sister agency, the FWS, or its department head, the Secretary, to challenge the Biological Opinion; under the "unitary" system of the federal government, interagency differences are generally resolved internally within the government rather than by litigation between different agencies. Cf. *Nevada v. United States, supra*, 463 U.S. at 127-128. Consequently, only parties situated similarly to the petitioners would bring lawsuits charging that the Secretary has overregulated under the ESA. Certainly, the Ninth Circuit failed to identify any alternative plaintiff better situated to bring such claims. The likelihood, or lack thereof, that another party may bring the type of claims asserted by petitioners is a relevant factor in determining the standing issue. *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984); *Joint Anti-Fascist Committee Refugee Committee v. McGrath*, 341 U.S. 123, 154 (1951) (Frankfurter, J., concurring);

*Barlow v. Collins, supra*, 397 U.S. at 175 n. 9 (Brennan, J., dissenting).

The Ninth Circuit's approach raises significant due process concerns in that parties whose interests are directly and adversely affected by agency action apparently lack a remedy to challenge such action. Cf. *Yakus v. United States*, 321 U.S. 414, 431-434 (1944). Certainly parties whose rights are unconstitutionally "taken" or otherwise adversely affected by agency action must have standing under constitutional principles to seek redress, particularly if they satisfy Article III standing requirements. Under a proper application of prudential standing principles, this potential constitutional problem does not arise, because parties have access to the courts whether the interests that they seek to vindicate are congruent with statutory objectives or not.

## C. Legislative History

The legislative history of the ESA reveals that the act, although originally enacted to pursue species protection goals, has been significantly amended to provide for broader consideration of economic impacts in competition with those goals. Thus, the statutory goals have expanded to provide for more balanced consideration of economic interests. In this sense, economic interests are not only "regulated" by the act, but also, to a degree, are "protected" by it.

As noted earlier, section 4(b)(2) of the ESA requires the Secretary to consider "economic impact[s]" in designating critical habitats. 16 U.S.C. 1533(b)(2). This provision was added as part of the 1978 amendments to the ESA. These amendments were designed to moderate the species protective character of the original legislation.[5/] Among other things, the amendments added an exemption to the section 7 consultation requirement, so that projects threatening jeopardy to species could nonetheless be authorized in certain circumstances by the Endangered Species Committee. See

5. See S. Rep. 874, 95th Cong., 2d Sess. 2 (1978); 124 Cong. Rec. 38123 (1978) (Rep. Bowen); *id.* at 38138 (Rep. Burgener); *id.* at 9803-98804 (Sen. Culver); *id.* at 9805 (Sen. Wallop).



Pub. L. 95-632, Section 3, 92 Stats. 3753, now codified at various provisions of 16 U.S.C. § 1536(e)-(p). In addition to requiring that economic impacts be considered in designating critical habitat, the 1978 amendments also provided for greater public participation in the habitat designation process, particularly by those in the affected area. Pub. L. 95-632, § 11, 92 Stat. 3764.

The 1978 amendments were described in the congressional debates as introducing greater "flexibility" into the ESA by requiring some balancing of economic and developmental interests against the interest in species protection.[6/] The intent was to avoid having important public works projects blocked entirely by ESA requirements.[7/] Thus, the 1978 amendments were partly a response to this Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978), which had halted completion of the Tellico Dam because of a congressional purpose in the ESA to protect endangered species whatever the cost.[8/] Because other major development projects were threatened by ESA requirements, members of Congress acknowledged the need to introduce "balance" and "flexibility" to avoid more extreme attempts at repeal of the ESA. See 124 Cong.

6. See H.R. Rep. 1625, 95th Cong., 2d Sess. 14 (1978) (the House bill introduces "some flexibility which will permit exemptions from the Act's stringent requirements"); *id.* at 13 ("flexibility" for Federal actions which cannot be completed without conflicting with section 7); *id.* at 17 ("flexibility" in determining critical habitat); S. Rep. 874, *supra*, at 3 (noting the "need for an amendment to the act which will provide flexibility in its administration"); 124 Cong. Rec. 38123-38124 (1978) (Rep. Bowen); *id.* at 38128 (Rep. Anderson); *id.* at 38132 (Rep. Murphy); *id.* at 38133 (Rep. Leggett); *id.* at 9804 (Sen. Baker); *id.* (Sen. Randolph); *id.* at 21133 (Sen. Culver); *id.* at 21137 (Sen. Wallop); *id.* at 21347 (Sen. Culver); see also H. R. Rep. 567, 97th Cong., 2d Sess. 10 (1982).

7. See 124 Cong. Rec. 37115 (1978) (Rep. Lott); *id.* (Rep. Whitten); *id.* at 38125 (Rep. Beard); *id.* at 38127 (Rep. Buchanan); *id.* at 38133 (Rep. Leggett); *id.* at 38145-38146 (Rep. Bowen).

8. See H. R. Rep. 1625, *supra*, at 10-11; S. Rep. 874, *supra*, at 2; 124 Cong. Rec. 37116 (1978) (Rep. Beard); *id.* at 38123-38124 (Rep. Bowen); *id.* at 38126 (Rep. Dingell); *id.* at 38131 (Rep. Hughes); *id.* at 38132 (Rep.Murphy); *id.* at 38133 (Rep. Leggett); *id.* at 21131-21132 (Sen. Culver); *id.* at 21138 (Sen. Baker).

Rec. 38133 (1978) (Rep. Leggett); *id.* at 38134 (Rep. Lehman); *id.* at 9805 (Sen. Wallop); *id.* at 21132 (Sen. Culver); *id.* at 21342 (Sen. Baker).

In presenting the conference report, Representative Murphy, the House floor manager, described the section 4(b)(2) requirement to consider economic impacts as "the most significant provision in the entire bill." 124 Cong. Rec. 38666 (1978). Representative Buchanan explained in the earlier House debates that this provision would make the Secretary be "more judicious" in specifying critical habitat so that the construction of needed projects would not be paralyzed. *Id.* at 38128. House Report 1625 also noted that with the requirement to consider economic impacts, the Committee expected that "the resultant critical habitat will be different from that which would have been established using solely biological criteria," and that in some situations "no critical habitat will be specified." H.R. Rep. 1625, *supra*, at 17. See also 124 Cong. Rec. 38131 (Oct. 14, 1978) (Rep. Hughes); *id.* at 38134 (Rep. Leggett); *id.* at 38156 (Rep. Buchanan). The beneficiaries of this provision were "persons living in such areas," *id.* at 38127 (Rep. Buchanan), who might be affected by such designations and whose economic interests should be considered when critical habitat is designated. Thus, Congress, in adopting requirements for designating critical habitats, specifically intended to benefit people like petitioners who were adversely affected by such designations.

Section 7 of the ESA, in requiring the Secretary to use the "best scientific data" in determining whether to list endangered species, also includes the petitioners' interests within its protective ambit. The original ESA legislation, adopted in 1973, required listing decisions under section 4 to be based upon the "best scientific . . . data." Pub.L. 93-205, § 4(b), 87 Stat. 887. The 1978 amendments added more detailed procedures for section 7 consultations, including a "best scientific data" requirement whenever the Secretary triggered section 7 consultation by advising a federal agency that listed species were present in the area of a proposed federal project. See Pub.L. 95-632, § 3; 92 Stat. 3753. The 1978 amendments also added a "best scientific data" requirement to the section 4 critical habitat designation process. See Pub.L. 95-632, §§ 11(4), 11(7); 92 Stat. 3765, 3766. The legislative history shows that these "best scientific data"



requirements were intended to protect economic interests from species protective actions that did not have a sound scientific basis. Numerous legislators described episodes where species protective actions were not scientifically justified.[9] Regardless of the accuracy of these environmental "horror stories," they demonstrate that the "best scientific data" requirement was intended to protect people like petitioners from species-protective actions that were based on ideological or policy preference, not good science.

The 1979 ESA amendments divided section 7(a) into three subsections and added to section 7(a)(2) the current ESA language, which provides that "[i]n fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." See Pub. L. 96-159, § 4(1), 93 Stat. 1226. This language was part of a package of amendments offered by Representative Breaux. 125 Cong. Rec. 28940-28941 (1979). These amendments were apparently prompted by a General Accounting Office (GAO) report which, according to Representative Bauman, "found that further legislative changes to the Endangered Species Act are needed to better balance species protection and economic growth and development." *Id.* at 28941. One of the

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9. Representative Lott noted that ESA restrictions had delayed or halted important public works projects, and that one of the "worst abuses" had "occurred in the listing process whereby species of plants and animals have been listed as endangered without even a scintilla of adequate supporting evidence". 124 Cong. Rec. 37115 (1978). Representative Bowen stated that the 1978 bill would ensure "that there can be economic growth and development", because "[f]or the first time, we are going to have proposed final regulations actually based on the best scientific data available -- current, not old data, but current data." *Id.* at 38123. Representative Beard noted how the FWS "is actively considering listing species which are not even threatened or endangered". *Id.* at 38125. Representative Buchanan described a listing decision that he suspected was not based on scientific data but on the "environmental activism" of FWS personnel. *Id.* at 38127 He went on to note that the 1978 legislation "is an attempt to address such problems." *Id.* Senator Wallop also described how the listing of certain alligators in Florida had not been scientifically based: "The agency representatives testified that biologically the alligator never did qualify as endangered, but that its listing as such was an example of emotional rather than biological reason dictating the species to be listed in the first place." *Id.* at 21136.

problems identified in the GAO report was "the failure to utilize the best scientific evidence available." *Id.* at 29050 (Rep. Bowen). House Conference Report 697 also described the GAO's criticism of listing decisions and GAO's conclusion that "if the Fish and Wildlife Service had . . . obtain[ed] adequate information on proposed species, including the development of the latest and best available scientific data as required by the Act, the species may never have been proposed in the first place." H.R. Conf. Rep. 697, 96th Cong., 1st Sess. 10 (1979). Thus, the 1979 legislative history also indicates that the "best scientific data" requirement was intended to benefit those who might otherwise be adversely affected by species-preservation actions that were based on policy preferences rather than good science.

Consequently, petitioners are within the zone of interests encompassed both by the "economic impact" requirement in section 4 and the "best scientific data" requirement in section 7.[10/] Because these statutory requirements set limits on the species protection goals of the ESA, they were necessarily intended to be enforced through claims of overregulation brought by persons, such as petitioners, whose economic interests had been adversely affected by noncompliance with these requirements. In this sense, the petitioners are both "regulated" and "protected" by the ESA.[11/]

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10. The "best scientific data" requirement was not intended to solely protect economic interests from overzealous and unscientific administration of the ESA. The 1978 legislative history also reveals concern that the FWS was withholding certain scientifically-justified species protective actions for fear that the resulting restrictions on development would provoke a political backlash. See 124 Cong. Rec. 21347 (1978) (Sen. Culver).

11. The policy statement in section 2(c)(2), 16 U.S.C. § 1531(c)(2) that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" was intended to "recognize the individual States' interest and, very often, the regional interest with respect to water allocation." S. Rep. 418, 97th Cong., 2d Sess. 25 (1982). Consequently, even if this policy statement did not change any substantive or procedural requirements of the ESA, *id.*, it does give special statutory recognition to the particular interest in water allocation at issue in this case. It is hard to see how such an interest can be excluded from the zone of interests encompassed by the ESA when the statute itself accords the interest in water allocation special recognition.



## II. PETITIONERS HAVE STANDING UNDER THE CITIZEN SUIT PROVISION OF THE ENDANGERED SPECIES ACT

The zone of interests test was developed as a gloss on section 10 of the APA. *Clarke, supra*, 479 U.S. at 395, 400 n. 16. This Court has not determined whether the "zone" test applies to other statutes authorizing judicial review. *Id.* at 400 n. 16. Congress clearly has the power, however, to abrogate all prudential limitations on standing, and thus to expand standing to the full extent permitted by Article III of the Constitution. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, __U.S.__, 1996 USLW 241649 (May 13, 1996); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991); *Gladstone Realtors, supra*, 441 U.S. at 100; *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Clearly the citizen suit provision of the ESA significantly broadens the right of persons to challenge agency decisions under that act. Under that provision, "any person may commence a civil action on his own behalf . . . (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . ., who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; . . ." 16 U.S.C. § 1540(g)(1). Read literally, the provision would authorize "any person" to challenge any agency "violation," regardless of whether the person has sustained actual injury or met other constitutional standing requirements. This Court has held, however, that Congress cannot abrogate the constitutional standing requirements contained in Article III. *Gladstone, supra*, 441 U.S. at 100. Therefore, notwithstanding the broad language of the citizen suit provision, any person challenging agency action under that provision must still satisfy Article III standing requirements.

On its face, the citizen suit provision, by authorizing actions by "any person" who asserts a violation of the ESA, appears to abrogate prudential standing requirements altogether in actions challenging agency action under the ESA. Thus, the provision

appears to authorize actions regardless of whether the plaintiff's interests fall within the "zone of interests" protected or regulated by the ESA, assuming of course that the plaintiff otherwise meets Article III standing requirements. The reference to "any person" suggests a congressional intent to broaden standing requirements to the constitutional limits authorized by Article III. Certainly nothing in the legislative history of the citizen suit provision suggests an intent to limit the standing of persons to maintain actions under that act.[12/] Moreover, in concluding that other statutes expanded standing to the full constitutional limit, the Court has relied mainly on the plain language of the statute in reaching its conclusion. See *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972) (construing "person aggrieved" in the Fair Housing Act, noting "[t]he language of the Act is broad and inclusive"); *Gladstone, Realtors, supra*, 441 U.S. at 103 (section 812 of the Fair Housing Act "on its face contains no particular statutory restrictions on potential plaintiffs"); *Gollust v. Mendell*, 501 U.S. 115, 122 (1991) ("the statutory definitions identifying the class of plaintiffs . . who may bring suit indicate that Congress intended to grant enforcement standing of considerable breadth.") (emphases added). Because statutes should be read in accordance with their plain meaning, see e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), the citizen suit provision of the

12. Section 11(g)(1)(A) and (B), 16 U.S.C. §§ 1540(g)(1)(A) and (B) were enacted as part of the original 1973 ESA legislation. See Pub. L. 93-205, § 11(g)(1)(A), (B), 87 Stat. 900. Senate Report 307, 93rd Cong., 1st Sess. 11 (1973), simply said that the citizen suit provision permits "private actions to enforce the provisions of this Act." See also 119 Cong. Rec. 25676 (1973) (Sen. Williams) (commenting that "[c]itizen suits are also permitted subject to certain conditions"); H.R. Rep. 1625, *supra*, at 7 ("In addition [to] the civil and criminal penalty provisions provided already discussed, the act authorizes any person, private entity, as well as any State or Federal agency to bring suit to enjoin violations of the act."). Section 11(g)(1)(C), 16 U.S.C. § 1540(g)(1)(C), was added in the 1982 ESA amendments. See Pub.L. 97-304, § 7(2), 96 Stat. 1425. See also H.R. Conf. Rep. 835, 97th Cong., 2d Sess. 35 (1982).



ESA would appear to abrogate prudential standing requirements altogether for all plaintiffs.[13/]

To be sure, the legislative history of the citizen suit provision of the Clean Water Act (CWA) suggests a primary congressional concern to broaden access to the courts for those seeking to promote the environmental goals of the CWA. Senator Muskie, the principal sponsor of the CWA, described this purpose in the following colloquy:

> "*Mr. Bayh.* Would an interest in a clean environment--which would be invaded by a violation of the Federal Water Pollution Control Act or a permit thereunder--be an 'interest' for the purposes of this section?
>
> "*Mr. Muskie.* That is the intent of the conference . . . . The conference report states: 'It is the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U. S. Supreme Court in the case of *Sierra Club v. Morton* ([405 U.S. 727 [92 S.Ct. 1361, 31 L.Ed.2d 636] (1972)].' . . . It is clear that under the language agreed to by the conference, a noneconomic interest in the environment, in

13. The legislative history of citizen suit provisions in other environmental statutes indicates an intent to eliminate all prudential standing restrictions. For example, in describing the citizen suit provision in the Surface Mining Control and Reclamation Act, 30 U.S.C. section 1270, the House Report noted: "It is the intent of the committee that the phrase 'any person having an interest which is or may be adversely affected' shall be construed to be coterminous with the broadest standing requirements enunciated by the U.S. Supreme Court." H.R. Rep. 218, 95th Cong., 1st Sess. 90 (1977) (emphasis added). The Senate Conference Report on the Clean Water Act also described the scope of the citizen suit provision as follows: "It is the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton* [405 U.S. 727 (1972)]". S. Conf. Rep. 1236, 92d Cong., 2d Sess., 146 (1972). Since *Sierra Club* dealt with the constitutional requirement of injury-in-fact, Congress apparently intended citizen suit standing under the Clean Water Act to be as broad as was constitutionally permissible.

clean water, is a sufficient base for a citizen suit under section 505.

"Further, every citizen of the United States has a legitimate and established interest in the use and quality of the navigable waters of the United States. Thus, I would presume that a citizen of the United States, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved."

"*Mr. Bayh.* I thank my good friend from Maine. I believe that the conference provision will not prevent any person or group with a legitimate concern about water quality from bringing suit against those who violate the act or a permit, or against the Administrator if he fails to perform a nondiscretionary act. These sorts of citizen suits--in which a citizen can obtain an injunction but cannot obtain money damages for himself--are a very useful additional tool in enforcing environmental protection laws. I am glad to see that authority for such suits is included in this bill." 118 Cong. Rec. 33717 (1972) (emphasis added).

Thus, the legislative history of the CWA makes clear that the citizen suit provision was intended to eliminate prudential standing requirements for litigants who pursue environmental interests. It is less clear, however, whether Congress intended to similarly eliminate prudential standing requirements for parties who assert economic interests that are in competition with these environmental interests.

The better view, the amici states believe, is that the citizen suit provision of the ESA abrogated prudential standing requirements for all parties who challenge agency action under the ESA, regardless of whether they seek to further environmental goals or not. The statutory language--which affords a cause of action for "any person" who asserts a violation of the statute--is generally a more reliable indicator of the congressional intent than the legislative history. Moreover, even assuming that the legislative history of the CWA is relevant to the ESA, the legislative history indicates only that Congress meant to broaden standing for those who pursue environmental goals, and does not indicate that Congress did not mean to broaden standing for those who pursue economic or other



goals.[14] Therefore, the petitioners are authorized to maintain their action under the citizen suit provision.

Whether or not the citizen suit provision of the ESA abrogates prudential standing requirements for persons who pursue economic rather than environmental interests, the provision clearly does not reduce the standing that such persons might have under other statutory authority to challenge such agency action. Therefore, if a person has standing to challenge agency action under section 10 of the APA, the action can be maintained regardless of whether the person has standing under the citizen suit provision. Nothing in the citizen suit provision suggests an intent to preclude actions that might otherwise be permissible under section 10 of the APA. On the contrary, the citizen suit provision expressly provides that "[t]he injunctive relief provided by this subsection shall not restrict any right which any person . . . may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency)." 16 U.S.C. § 1540(g)(5). Also, section 12 of the APA, 5 U.S.C. § 559, provides that subsequent legislation shall not supersede or modify the right of review granted by section 10 of the APA unless the language in a subsequent statute "expressly" so provides. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). Thus, although the citizen suit provision expands standing by authorizing actions by some persons who may fail to meet the prudential requirements of the APA, the provision does not reduce standing by precluding actions by persons who otherwise meet these prudential requirements. As we have explained, the petitioners in this case satisfy the prudential standing requirements of the APA. Hence, they are authorized to maintain their action regardless of whether they have standing under the citizen suit provision.

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14. For example, Congress thought that the citizen suit provision of the Resource Conservation and Recovery Act would be available to police agency overregulation as well as underregulation. See H.R. Rep. 1491(I), 94th Cong., 2d Sess. 26 (1976) ("It is the Committee's view that the[re] is sufficient public input and this coupled with the citizen suit provisions contained in section 702, and the section permitting petitions for new regulations provide sufficient protection from both overzealous or lax regulation.") (emphasis added).

Additionally, whether or not the citizen suit provision abrogates prudential standing requirements for persons pursuing economic rather than environmental interests, the provision nonetheless affords a remedy for such persons if they are able to meeting prudential standing requirements. To conclude otherwise would be to wholly disregard the statutory language affording a remedy for "any person" who asserts a "violation" of the act. Therefore, a person who meets prudential standing requirements has a remedy under the citizen suit provision, regardless of the interests that are being asserted. As explained above, the petitioners in this case meet prudential standing requirements, and thus are authorized to maintain an action under the citizen suit provision under any circumstances.

This analysis is consistent with the historical development of regulation and standing principles. The first forms of regulation were largely economic: regulation of railroads and transportation by the Interstate Commerce Commission; economic regulation of banks, securities, communications during the New Deal era; and the like. Regulation of "non-economic" interests, such as protection of the environment and of health and safety, appeared much later, in the 1960s and thereafter. Consequently, traditional standing principles, as applied to economic interests adversely affected by regulation, were developed in the earlier era. See *Sierra Club v. Morton, supra,* 405 U.S. at 733 ("Palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review."). The advent of environmental regulation gave rise to conceptual questions regarding the standing of parties who assert non-economic values and interests. *Sierra Club* partially answered the question by broadening access to courts for environmental plaintiffs who are able to assert "injury-in-fact." Thereafter, Congress often included citizen suit provisions in environmental statutes, such as the CWA and the ESA, to ensure that plaintiffs who satisfied the *Sierra Club* standard would have standing to promote Congress' environmental goals and policies. This occurred, however, against a backdrop of well-established standing principles that had been applied to economic interests adversely affected by government regulation. In enacting citizen suit provisions, Congress intended to broaden judicial access for parties who assert environmental interests, but



did not intend to eliminate or otherwise restrict standing for parties who assert economic interests. In short, the congressional intent was to let "non-economic" or "environmental" plaintiffs into the standing club, not throw economic interests out of the club.[15]

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15. In support of its decision, the Ninth Circuit below cited its earlier decision in *Gonzales v. Gorsuch*, 688 F.2d 1263 (9th Cir. 1982), authored by then-Judge Kennedy. There, the court, although holding that the plaintiff lacked constitutional standing under Article III, stated that the citizen suit provision of the CWA "was intended to grant standing to a nationwide class, comprised of citizens who alleged an interest in clean water." 688 F.2d at 1266. Thus, although the court stated that the citizen suit provision affords standing for those seeking to pursue environmental goals, the court did not suggest that the provision precludes standing for other litigants pursuing economic interests. Thus, *Gonzales* does not contradict our argument that the citizen suit provision affords standing to such litigants.

The Ninth Circuit also cited its earlier decision in *Dan Caputo Co. v. Russian River County Sanitation*, et al., 749 F.2d 571 (9th Cir. 1984), signed by then-Judge Kennedy. There, the Ninth Circuit held that a plaintiff who had failed to submit a bid for a contract to build a sewage treatment facility did not have standing under the citizen suit provision of the CWA to challenge decisions of the EPA and the State of California awarding the construction contract to another contractor. In our view, the court erred in holding that the plaintiff contractor could not maintain his action under the citizen suit provision because he did not meet prudential standing requirements, although, to be sure, the State of California argued that the plaintiff contractor lacked standing under the citizen suit provision. As we acknowledged above, however, the question whether prudential standing requirements are abrogated for persons who assert economic interests is a close one and is not free from doubt. In any event, the plaintiff contractor in *Russian River* could not maintain his action under section 10 of the APA because he did not meet prudential standing requirements, and is thus distinguished from the petitioners here, who meet prudential standing requirements and thus are authorized to maintain an action under section 10.

## CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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